

**Before the
Federal Communications Commission
WASHINGTON, D.C. 20554**

In the Matter of)	
)	
Cricket Communications, Inc.)	File No.: EB-10-SE-051
)	NAL/Acct. No.: 201132100023
Licensee of Station WQJE535)	FRN: 0010202521
Midway, Kentucky)	
)	
Licensee of Station WQJF544)	
Frankfort, Kentucky)	

ORDER AND NOTICE OF APPARENT LIABILITY FOR FORFEITURE

Adopted: February 1, 2011

Released: February 1, 2011

By the Acting Chief, Spectrum Enforcement Division, Enforcement Bureau:

I. INTRODUCTION

1. In this *Order and Notice of Apparent Liability for Forfeiture* (“NAL”), we find Cricket Communications, Inc. (“Cricket”), licensee of common carrier fixed point-to-point microwave stations, call signs WQJE535, Midway, Kentucky, and WQJF544, Frankfort, Kentucky, apparently liable for a forfeiture in the amount of twenty thousand dollars (\$20,000) for willful violation of section 1.17(a)(2) of the Commission’s rules (“Rules”).¹ The noted violation involves Cricket’s provision of incorrect material factual information to the Commission regarding the construction of station WQJE535 without a reasonable basis for believing that the information was correct and accurate. We also admonish Cricket for operating stations WQJE535 and WQJF544 for seven months prior to obtaining Commission authority in violation of section 301 of the Communications Act of 1934, as amended, (“Act”)² and section 1.903(a) of the Rules,³ and we direct Cricket to take all necessary and appropriate steps to ensure future compliance.

II. BACKGROUND

2. On August 11, 2008, and August 20, 2008, the Wireless Telecommunications Bureau (“WTB”) issued to Cricket licenses for two common carrier fixed point-to-point microwave radio service stations, call signs WQJE535, Midway, Kentucky, and WQJF544, Frankfort, Kentucky, respectively.⁴ The deadline for constructing station WQJE535 was February 11, 2010, and the deadline for constructing station WQJF544 was February 20, 2010.⁵ Section 1.946 of the Rules requires licensees commencing

¹ 47 C.F.R. § 1.17(a)(2).

² 47 U.S.C. § 301.

³ 47 C.F.R. § 1.903.

⁴ File Nos. 0003483193 (WQJE535, granted August 11, 2008) and 0003483929 (WQJF544, granted August 20, 2008). Cricket filed its initial applications for these licenses on June 23, 2008, and on June 24, 2008, respectively.

⁵ See 47 C.F.R. § 101.63 (stating that “[c]onstruction of any authorized facility or frequency must be completed by the date specified in the license as pursuant to section 1.946”).

service or operations within the construction period to notify the Commission by filing FCC Form 601 within 15 days of the expiration of the construction period.⁶ On February 2, 2010, Cricket filed a construction notification stating that station WQJE535 was constructed on October 15, 2008.⁷ On March 5, 2010, Cricket filed a modification application for station WQJE535 “to correct the construction date provided in its buildout notification and to seek a limited waiver of 47 C.F.R. § 1.903 for its inadvertent failure to file an application prior to the construction and operation of the microwave station.”⁸ In the modification application, Cricket reported that since filing the buildout notice, it determined that the facility was constructed and placed into operation more than two years earlier, on January 23, 2008.⁹ Similarly, on March 5, 2010, Cricket filed a construction notification for station WQJF544 stating that this station was constructed and placed into operation on January 23, 2008.¹⁰ In its construction notification for station WQJF544, Cricket also requested a waiver of section 1.903 of the Rules for failure to file an application before its construction and operation of station WQJF544. On May 5, 2010, WTB denied Cricket’s requests for waiver of section 1.903 of the Commission’s rules, granted its modification application to correct the inaccurate construction date provided for station WQJE535, and accepted the construction notification for station WQJF544.¹¹

3. Because Cricket reported an inaccurate construction date and because it appeared that Cricket operated its microwave stations prior to obtaining authority, the WTB referred this case to the Enforcement Bureau for investigation and possible enforcement action. On June 1, 2010, the Enforcement Bureau’s Spectrum Enforcement Division (“Division”) issued a letter of inquiry (“LOI”) to Cricket.¹²

4. In its July 6, 2010 response to the LOI,¹³ Cricket maintained that in the past, it has relied upon outside contractors to build its microwave sites, obtain the required Commission authorizations to operate the sites, and file the associated construction notices.¹⁴ Cricket stated that after receiving a notification from the Commission regarding the upcoming deadlines for constructing stations WQJE535 and WQJF544 in November of 2009, it discovered that its engineering consultant retained in connection with the installation of both facilities had not filed construction notifications for these sites.¹⁵ Cricket

⁶ See 47 C.F.R. § 1.946.

⁷ File No. 0004113568 (February 3, 2010).

⁸ File No. 0004149031 (March 5, 2010) (Ex.A: Description of Modification and Request for Waiver).

⁹ *Id.*

¹⁰ File No. 0004149018 (March 5, 2010) (Ex.A: Description of Notification and Request for Waiver).

¹¹ File No. 0004149031 (granted May 5, 2010); File No. 0004149018 (accepted May 5, 2010). Actions on Cricket’s applications were without prejudice to enforcement action for Cricket’s unauthorized operation of stations WQJE535 and WQJF544 and the inaccurate reporting of the construction date for station WQJE535.

¹² Letter from Kathryn S. Berthot, Chief, Spectrum Enforcement Division, Enforcement Bureau, Federal Communications Commission, to Robert J. Irving, Jr., Senior Vice President, Cricket Communications, Inc. (June 1, 2010).

¹³ Letter from James H. Barker, Esq., Counsel for Cricket Communications, Inc., to Kathy Harvey, Spectrum Enforcement Division, Enforcement Bureau, Federal Communications (July 6, 2010) (“LOI Response”). Cricket requested an extension until July 6, 2010 to file its LOI Response. Cricket’s extension request was granted on June 30, 2010.

¹⁴ LOI Response at 3.

¹⁵ *Id.*

asserted that in collecting information in connection with the preparation of the construction notifications for these two stations, Cricket's personnel were also gathering information on all of its microwave sites to confirm that notifications had been filed for the other sites.¹⁶ According to Cricket, it believes that the construction date for station WQJE535 was misidentified as a result of a clerical error or miscommunications between the employees who were responsible for gathering information for submission in the construction notification.¹⁷ In preparing the construction notification for station WQJF544, Cricket asserted, it discovered that its engineering consultant failed to obtain the required authorization prior to commencing operations, and that an incorrect construction date had been provided for station WQJE535. Cricket averred that immediately upon this discovery, it filed a modification application for station WQJE535 notifying the Commission of the error, and identifying the correct construction and commencement of operation dates as January 23, 2008.

III. DISCUSSION

A. Cricket Apparently Provided Incorrect Material Factual Information to the Commission

5. Section 1.17 of the Rules states that no person may provide, in any written statement of fact, "material factual information that is incorrect or omit material information that is necessary to prevent any material factual statement that is made from being incorrect or misleading without a reasonable basis for believing that any such material factual statement is correct and not misleading."¹⁸ Any holder of any Commission authorization is subject to the Rule.¹⁹ In expanding the scope of section 1.17 of the Rules in 2003 to include written statements that are made without a reasonable basis for believing the statement is correct and not misleading, the Commission explained that this requirement was intended to more clearly articulate the obligations of persons dealing with the Commission, ensure that they exercise due diligence in preparing written submissions, and enhance the effectiveness of the Commission's enforcement efforts.²⁰ Thus, even in the absence of an intent to deceive, a false statement provided without a reasonable basis for believing that the statement is correct and not misleading constitutes an actionable violation of section 1.17 of the Rules.²¹

6. As the Commission has stated, parties must "use due diligence in providing information that is correct and not misleading to the Commission, including taking appropriate affirmative steps to determine the truthfulness of what is being submitted. A failure to exercise such reasonable diligence would mean that the party did not have a reasonable basis for believing in the truthfulness of the information."²² In the construction notification that Cricket filed on February 2, 2010, it stated that

¹⁶ *Id.*

¹⁷ *Id.* at 3-4.

¹⁸ 47 C.F.R. § 1.17(a)(2).

¹⁹ 47 C.F.R. § 1.17(b)(2).

²⁰ See *Amendment of Section 1.17 of the Commission's Rules Concerning Truthful Statements to the Commission*, Report and Order, 18 FCC Rcd 4016, 4021 (2003), *recon. denied*, Memorandum Opinion and Order, 19 FCC Rcd 5790, *further recon. denied*, Memorandum Opinion and Order, 20 FCC Rcd 1250 (2004) ("*Amendment of Section 1.17*").

²¹ See *id.* at 4017 (stating that the revision to section 1.17 of the Rules is intended to "prohibit incorrect statements of omissions that are the results of negligence, as well as an intent to deceive").

²² *Amendment of Section 1.17*, 18 FCC Rcd at 4021.

station WQJE535 was constructed on October 15, 2008. As noted above, however, Cricket subsequently filed a modification application correcting the construction date that it had previously provided, and identified the actual construction date as January 23, 2008. Had Cricket exercised even minimal diligence prior to the submission of its construction notification, it would not have submitted incorrect and misleading material factual information in its construction notification.²³ Although there is insufficient information to conclude that Cricket's provision of incorrect material factual information was intentional in violation of section 1.17(a)(1) of the Rules,²⁴ we find that Cricket apparently willfully violated section 1.17(a)(2) of the Rules by providing material factual information that was incorrect without a reasonable basis for believing that the information was correct and not misleading.²⁵

B. Operation of Stations without Authorization

7. Section 301 of the Act and section 1.903(a) of the Rules prohibit the use or operation of any apparatus for the transmission of energy or communications or signals by a wireless radio station except under and in accordance with a Commission granted authorization.²⁶ Cricket was issued two licenses for stations WQJE535 and WQJF544 on August 11, 2008, and August 20, 2008, respectively. As Cricket has acknowledged, however, both of these stations were constructed and placed into operation on January 23, 2008, approximately seven months prior to issuance of the licenses. Therefore, we find that Cricket violated section 301 of the Act and section 1.903(a) of the Rules by operating stations WQJE535 and WQJF544 without authorization.

C. Proposed Forfeiture

8. Section 503(b) of the Act²⁷ authorizes the Commission to assess a forfeiture for each willful or repeated violation of the Act or of any rule, regulation, or order issued by the Commission under the Act. In exercising such authority, we are required to take into account "the nature, circumstances, extent, and gravity of the violation and, with respect to the violator, the degree of culpability, any history of prior offenses, ability to pay, and such other matters as justice may require."²⁸

²³ See *Invision Industries, Inc.*, Notice of Apparent Liability for Forfeiture, 23 FCC Rcd 13095, 13103-04 (2008) (finding that a television importer's failure to exercise due diligence to ensure that the information provided in its LOI Response was correct and not misleading constituted a violation of section 1.17(a)(2) of the Rules) ("*Invision*"); *Syntax-Brilliant Corporation*, Forfeiture Order and Notice of Apparent Liability for Forfeiture, 23 FCC Rcd 6323, 6342 (2008) (finding that a television manufacturer apparently provided incorrect material information concerning its importation and interstate shipment of non-DTV-compliant televisions without a reasonable basis for believing that the information was correct and not misleading, in violation of section 1.17(a)(2) of the Rules); *Citicasters License, L.P., et al.*, Memorandum Opinion and Order and Notice of Apparent Liability, 22 FCC Rcd 19324, 19338 (2007) (forfeiture paid) (finding that a licensee's false certification that it had not violated the Act or any Commission Rules during the preceding license term had no reasonable basis and was not made with the intent to deceive the Commission but nonetheless, violated section 1.17(a)(2) of the Rules) ("*Citicasters*"). See also *Cardinal Broadband LLC, aka Sovereign Telecommunications*, Notice of Apparent Liability for Forfeiture, 23 FCC Rcd 12233, 12237 (Enf. Bur. 2008) ("*Cardinal Broadband LLC*"), *response pending* (finding that an interconnected VoIP provider provided without a reasonable basis for believing that the information was correct and accurate incorrect material factual information in violation of section 1.17(a)(2) of the Rules).

²⁴ 47 C.F.R. 1.17(a)(1).

²⁵ See, e.g., *Cardinal Broadband LLC*, 23 FCC Rcd at 12237.

²⁶ 47 U.S.C. § 301; 47 C.F.R. § 1.903(a).

²⁷ 47 U.S.C. § 503(b).

²⁸ 47 U.S.C. § 503(b)(2)(E).

9. Under the *Forfeiture Policy Statement*²⁹ and section 1.80 of the Rules,³⁰ the base forfeiture amount for misrepresentation or lack of candor is the statutory maximum.³¹ Therefore, for common carriers such as Cricket, the base forfeiture is \$150,000 for each violation or each day of a continuing violation. Given the totality of the circumstances, we find a significant forfeiture appropriate.³² The Commission has stated that “[we rely] heavily on the truthfulness and accuracy of the information provided to us. If information submitted to us is incorrect, we cannot properly carry out our statutory responsibilities.”³³ Cricket’s failure to exercise due diligence to ensure that the information provided in its notification of construction was correct and not misleading hampered the Commission’s ability to properly carry out its statutory responsibilities and unnecessarily consumed Commission resources.³⁴

10. Cricket asserted that its inaccurate reporting of the construction date for station WQJE535 was the result of a clerical error or miscommunication on the part of its employees. However, it is well established that licensees are responsible for the acts and omissions of their employees or contractors.³⁵ We also note that Cricket failed to disclose the accurate construction and operation dates

²⁹ *The Commission’s Forfeiture Policy Statement and Amendment of Section 1.80 of the Rules to Incorporate the Forfeiture Guidelines*, Report and Order, 12 FCC Rcd 17087, 17113 (1997) (“*Forfeiture Policy Statement*”), *recon. denied*, 15 FCC Rcd 303 (1999).

³⁰ 47 C.F.R. § 1.80(b)(4), Note to Paragraph (b)(4): Section I. Base Amounts for Section 503 Forfeitures.

³¹ *See, e.g., SBC Communications, Inc.*, Notice of Apparent Liability, 16 FCC Rcd 19091, 19120 (2001) (statutory maximum forfeiture amount proposed for intentional violation of section 1.17 of the Rules) (subsequent history omitted).

³² *See, e.g., Access.1 New York License Company, LLC*, Notice of Apparent Liability, 22 FCC Rcd 15205, 15209 ¶ 11 (Media Bur. 2007) (forfeiture amount proposed for provision of incorrect material factual information adjusted downward from statutory maximum amount of \$32,500 to \$10,000 on basis that violation was unintentional). *Compare Syntax-Brilliant Further NAL*, 23 FCC Rcd at 6343 ¶ 46 (proposing statutory maximum forfeiture (\$11,000) for apparent negligent misrepresentation based on totality of the circumstances; company corrected the erroneous information only after the Commission had relied on it in an earlier enforcement action); *Intelsat North America*, Notice of Apparent Liability, 21 FCC Rcd 9246, 9250 ¶ 12 (Enf. Bur., Inv. & Hearings Div. 2006) (proposing statutory maximum forfeiture (\$11,000) for apparent negligent misrepresentation based on the totality of the circumstances, including ability to pay and the Commission’s reliance on the incorrect information). We note that in the *Syntax-Brilliant* and *Intelsat* cases, our statutory maximum forfeiture was significantly less than that applicable to broadcast licensees and common carriers.

³³ *In the Matter of Amendment of Section 1.17 of the Commission’s Rules Concerning Truthful Statements to the Commission*, Notice of Proposed Rulemaking, 17 FCC Rcd 3296, 3297 ¶ 3 (2002).

³⁴ Construction notifications serve the important purpose of maintaining the integrity of information in the Commission’s licensing databases by correctly reflecting the actual record. *See Amendment of the Commission’s Rules Regarding Dedicated Short-Range Communication Services in the 5.850-5.925 GHz Band (5.9 GHz Band)*, Report and Order, 19 FCC Rcd 2458, 2495 ¶ 83 (2004). The construction notification requirement also ensures that licensees have met their responsibility. *See Paging Systems, Inc.*, Order, 21 FCC Rcd 7225 (WTB PSCID 2006).

³⁵ *See, e.g., Wagenvoort Broadcasting Co.*, 35 FCC 2d 361, 361-62 ¶ 3 (1972) (finding that it is the broadcast licensee’s responsibility to comply with the pre-sunrise restrictions, and denying the claim that the forfeiture should be cancelled or mitigated because it relied upon its consulting engineer’s erroneous advice); *Charter Communications VI, LLC*, 17 FCC Rcd 16516, 16518-19 ¶¶ 8-9 (Enf. Bur. 2002) (finding that it is the cable operator’s responsibility to comply with signal leakage standards and a prior cease operation order, and denying the claim that the forfeiture should be reduced because the violations were due to its employees’ lapses and misunderstandings).

for stations WQJE535 and WQJF544 in the initial license applications filed in June of 2008 and at the time of the grants in August of 2008.³⁶ Cricket only revealed the correct date of construction and operation a full two years after the stations first began operating. Accordingly, considering all of the enumerated factors and the particular circumstances of this case, we find that a forfeiture of \$25,000 is warranted here for Cricket's apparent willful violation of section 1.17(a)(2).³⁷ We find, however, that a downward adjustment of the proposed forfeiture from \$25,000 to \$20,000 is warranted because Cricket made voluntary disclosures to Commission staff, albeit belatedly, and undertook corrective measures after learning of its violations, *but* prior to any Commission inquiry or initiation of enforcement action.³⁸

11. We also admonish Cricket for its operation of stations WQJE535 and WQJF544 for seven months in violation of section 301 of the Act and section 1.903(a) of the Rules,³⁹ and direct Cricket to take all necessary and appropriate steps to ensure compliance going forward. We caution Cricket to exercise greater diligence in the future, and we emphasize the importance of accuracy and completeness in the application process.⁴⁰

IV. ORDERING CLAUSES

12. Accordingly, **IT IS ORDERED** that, pursuant to section 503(b) of the Communications Act of 1934, as amended, and sections 0.111, 0.311, and 1.80 of the Commission's Rules,⁴¹ Cricket Communications, Inc. **IS** hereby **NOTIFIED** of this **APPARENT LIABILITY FOR A FORFEITURE** in the amount of twenty thousand dollars (\$20,000) for providing incorrect material factual information to the Commission without a reasonable basis for believing that the information was correct and accurate in apparent willful violation of section 1.17(a)(2) of the Rules.

³⁶ We note that all applicants for common carrier fixed point-to-point microwave station licenses must certify that "all statements made in th[e] applications and in the exhibits, attachments, or documents incorporated by reference...are true, complete, correct, and made in good faith." See Form 601; General Certification Statements. Furthermore, pursuant to section 1.65 of the Rules, applicants for Commission licenses are "responsible for the continuing accuracy and completeness of information furnished in a pending application." 47 C.F.R. § 1.65(a). Rather than providing complete and accurate information, the dates provided by Cricket in its filings led the Commission to believe that the company did not construct or operate until two months after WTB granted the application, when, in fact, Cricket began operating the stations five months prior to seeking authorization and seven months prior to the grants.

³⁷ See *Cardinal Broadband LLC*, 23 FCC Rcd at 12237 (proposing a \$25,000 forfeiture against an interconnected VoIP provider and common carrier for its violation of section 1.17(a)(2) of the Rules).

³⁸ See, e.g., *Radio One Licenses, Inc.*, 18 FCC Rcd 15964, 15965 ¶ 4 (2003), *recon. denied*, 18 FCC Rcd 25481 (2003); *Emery Telephone*, 13 FCC Rcd 23854, 23858 (1998), *recon. denied*, 15 FCC Rcd 7181 (1999); *Petracom of Texarkana, LLC*, 19 FCC Rcd 8096, 8097-98 ¶¶ 5-6 (Enf. Bur. 2004); *American Family Association*, 17 FCC Rcd 181135, 18137 (Enf. Bur. 2002), *recon. denied*, 18 FCC Rcd 2413 (Enf. Bur. 2003); *but see American Paging, Inc.*, 12 FCC Rcd 10417, 10420 (WTB, Enf. and Consumer Info. Div., 1997) (finding that the mitigating effect of voluntary disclosure was abrogated by the licensee's delay).

³⁹ See 47 U.S.C. § 503(b)(6); see also note 4 *supra*.

⁴⁰ Willful false statements made to the Commission in the context of a license application are punishable by fine and/or imprisonment (18 U.S.C. § 1001), and/or revocation of any station license or construction permit (47 U.S.C. § 312(a)(1)), and/or forfeiture (47 U.S.C. § 503).

⁴¹ 47 U.S.C. § 503(b), 47 C.F.R. §§ 0.111, 0.311, and 1.80.

13. **IT IS FURTHER ORDERED** that Cricket Communications, Inc. **IS ADMONISHED** for its violation of section 301 of the Act and section 1.903(a) of the Rules.

14. **IT IS FURTHER ORDERED** that, pursuant to section 1.80 of the Commission's Rules within thirty days of the release date of this Notice of Apparent Liability for Forfeiture, Cricket Communications, Inc., **SHALL PAY** the full amount of the proposed forfeiture or **SHALL FILE** a written statement seeking reduction or cancellation of the proposed forfeiture.

15. Payment of the forfeiture must be made by check or similar instrument, payable to the order of the Federal Communications Commission. The payment must include the NAL/Account Number and FRN referenced above. Payment by check or money order may be mailed to Federal Communications Commission, P.O. Box 979088, St. Louis, MO 63197-9000. Payment by overnight mail may be sent to U.S. Bank – Government Lockbox #979088, SL-MO-C2-GL, 1005 Convention Plaza, St. Louis, MO 63101. Payment by wire transfer may be made to ABA Number 021030004, receiving bank TREAS/NYC, and account number 27000001. For payment by credit card, an FCC Form 159 (Remittance Advice) must be submitted. When completing the FCC Form 159, enter the NAL/Account number in block number 23A (call sign/other ID), and enter the letters "FORF" in block number 24A (payment type code). Requests for full payment under an installment plan should be sent to: Chief Financial Officer -- Financial Operations, 445 12th Street, S.W., Room 1-A625, Washington, D.C. 20554. Please contact the Financial Operations Group Help Desk at 1-877-480-3201 or Email: ARINQUIRIES@fcc.gov with any questions regarding payment procedures. Cricket Communications, Inc. must also send electronic notification on the date said payment is made to Kathy Harvey at Kathy.Harvey@fcc.gov and to Ricardo Durham at Ricardo.Durham@fcc.gov.

16. The written statement seeking reduction or cancellation of the proposed forfeiture, if any, must include a detailed factual statement supported by appropriate documentation and affidavits pursuant to sections 1.80(f)(3) and 1.16 of the Rules. The written statement must be mailed to the Office of the Secretary, Federal Communications Commission, 445 12th Street, S.W., Washington, D.C. 20554, ATTN: Enforcement Bureau – Spectrum Enforcement Division, and must include the NAL/Acct. No. referenced in the caption. The statement must also be emailed to Kathy Harvey at Kathy.Harvey@fcc.gov and Ricardo Durham at Ricardo.Durham@fcc.gov.

17. The Commission will not consider reducing or canceling a forfeiture in response to a claim of inability to pay unless the petitioner submits: (1) federal tax returns for the most recent three-year period; (2) financial statements prepared according to generally accepted accounting practices ("GAAP"); or (3) some other reliable and objective documentation that accurately reflects the petitioner's current financial status. Any claim of inability to pay must specifically identify the basis for the claim by reference to the financial documentation submitted.

18. **IT IS FURTHER ORDERED** that, pursuant to sections 4(i) and 4(j) of the Act⁴² and section 1.17 of the Rules,⁴³ Cricket Communications **SHALL TAKE ALL NECESSARY AND APPROPRIATE STEPS** to ensure future compliance with section 1.17(a)(2) of the Rules, and with section 301 of the Act and section 1.903(a) of the Rules.

⁴² 47 U.S.C. § 154(i),(j).

⁴³ 47 C.F.R. § 1.17.

19. **IT IS FURTHER ORDERED** that a copy of this *Order and Notice of Apparent Liability for Forfeiture* shall be sent by Certified Mail, Return Receipt Requested, and regular mail, to Robert J. Irving, Jr., Senior Vice President, Cricket Communications, Inc., 5887 Copley Drive, San Diego, CA 92111, and to James H. Barker, Esq., Latham & Watkins, LLP, 555 Eleventh Street, N.W., Suite 1000, Washington, D.C. 20004-1304.

FEDERAL COMMUNICATIONS COMMISSION

Ricardo M. Durham
Acting Chief, Spectrum Enforcement Division
Enforcement Bureau